PERWIRA HABIB BANK MALAYSIA BHD.

v.

SAMUEL PAKIANATHAN A/L JABAMANICKAM

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HJ. MOHD. JEMURI BIN SERJAN CJ (BORNEO), TAN SRI DATO' HJ. MOHD. AZMI BIN DATO' HJ KAMARUDDIN SCJ, DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[CIVIL APPEAL NO. 02-404 OF 1990]
13 MAY 1993

BANKRUPTCY: Lower Court striking out bankruptcy petition - Appeal against order of lower Court - Consideration of ss. 3(1)(i) & 5(2) Bankruptcy Act 1967.

The respondent executed a contract of guarantee with the appellant in return for the appellant granting a term loan and overdraft facility to a company of which the respondent was a director. The company failed to make repayment of the banking facilities and the appellant sued on the contract of guarantee. The appellant obtained final judgment and initiated bankruptcy proceedings against the respondent.

The learned Judge struck out the bankruptcy petition against the respondent and the bank appealed on the ground that the learned Judge had erred in law when he held that the respondents counterclaim exceeded or equalled the judgment sum of RM11.2 million on which the bankruptcy notice was based, within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967 (the Act).

The appellant further contended that the learned Judge was wrong in holding that s. 5(2) of the Act was applicable and that the failure to comply with the condition imposed by that section was fatal to the creditors petition.

Held:

[1] Before the existence of a counterclaim could be a defence to a judgment creditors petition three ingredients had to be satisfied, namely, the burden was on the respondent to show, by affidavit, that the counterclaim must be capable of being quantified in terms of money and the affidavit must quantify it, the counterclaim must be put forward in good faith and must have reasonable probabilities of success and the affidavit must show that the counterclaim could not have been set up in the action in which the judgment relied on by the creditor was obtained.

[2] Having failed to satisfy all the three ingredients in his affidavits, it was clear that the respondent had not proved that he had a counterclaim which equalled or exceeded the appellant's claim within the meaning of s. 3(1)(i) of the Act.

[3] The learned Judge was wrong to extend the application of s. 3(1)(i) to cover all pending counterclaims irrespective of whether they could or could not have been filed at the hearing in which summary judgment was obtained. Such an interpretation would be tantamount to altering the words used by the legislature in s. 3(1)(i) of the Act and ignored the established principle of interpretation of statutes where the literal meaning of the words used is clear and reflective of the purposes of the provision.

[4] The word "debtor" appearing in both ss. 2 & 5(2) of the Act must mean and should be limited to the actual debtor involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. To clothe the appellant as a secured creditor under s. 5(2) of the Act, it must be shown that the appellant was holding a mortgage, charge or lien on the property of the respondent as security for the debt due to the appellant from the respondent.

[5] It was common ground that the respondent had not given any security to the appellant for his debt as a guarantor. Thus as far as the respondent was concerned, the appellant was not a secured creditor within the meaning of s. 5(2) of the Act, and as such non compliance with its requirement could not be fatal to the petition.

[6] The "wider" or liberal interpretation of s. 5(2) advocated by the learned Judge in *Yip Kim Khoon's* case was a serious departure from the established principle of strict interpretation of bankruptcy legislation.

[Appeal allowed with costs. Order striking out judgment creditors petition set aside. Petition restored and to be heard on merits].

[**Bahasa Malaysia** Translation of Headnote]

KEBANKRAPAN: Mahkamah bawah membatalkan petisyen kebankrapan - Rayuan terhadap perintah Mahkamah bawah - Pertimbangan ss. 3(1)(i) & 5(2), Akta Kebankrapan 1967.

Responden telah menandatangani satu kontrak jaminan dengan perayu sebagai balasan kepada perayu yang memberikan satu pinjaman berjangka dan kemudahan overdraf kepada sebuah syarikat di mana responden merupakan seorang pengarahnya. Syarikat tersebut gagal untuk membuat pembayaran balik akan kemudahan-kemudahan urusan bank tersebut dan perayu telah menyaman atas kontrak jaminan tersebut. Perayu telah mendapatkan penghakiman muktamad dan memulakan tindakan kebankrapan terhadap responden.

Hakim yang bijaksana tersebut telah mambatalkan petisyen kebankrapan terhadap responden dan bank berkenaan telah membuat rayuan atas alasan bahawa Hakim yang arif tersebut telah tersilap dalam undang-undang apabila beliau memutuskan bahawa tuntutan balas melebihi atau menyamai jumlah wang penghakiman sebanyak RM11.2 juta atas mana tindakan kebankrapan tersebut didasarkan, dalam lingkungan maksud s. 3(1)(i) Akta Kebankrapan 1967 (Akta tersebut).

Perayu seterusnya mendebatkan bahawa Hakim yang bijaksana tersebut telah salah dalam memutuskan bahawa s. 5(2) Akta tersebut adalah terpakai dan bahawa kegagalan mematuhi syarat yang dikenakan oleh seksyen tersebut adalah membawa padah kepada petisyen pemiutang.

Diputuskan:

[1] Sebelum kewujudan tuntutan balas dapat menjadi satu pembelaan kepada petisyen pemiutang penghakiman, tiga sifat perlulah dipenuhi, iaitu, beban terletak di atas responden untuk menunjukkan, melalui afidavit, bahawa tuntutan balas berkenaan berupaya dihitung dalam bentuk wang dan afidavit tersebut mestilah menyatakan kuantitinya, tuntutan balas berkenaan hendaklah dikemukakan dengan suci hati dan mestilah mempunyai kebarangkalian kejayaan yang munasabah dan afidavit tersebut mestilah menunjukkan bahawa tuntutan balas itu tidak dapat dimasukkan dalam tindakan di mana penghakiman yang dipersandarkan oleh pemiutang tersebut diperolehi.

[2] Memandangkan responden gagal untuk memenuhi ketiga-tiga sifat berkenaan dalam afidavitnya, adalah jelas bahawa responden tidak membuktikan bahawa dia mempunyai tuntutan balas yang menyamai atau melebihi tuntutan perayu dalam lingkungan maksud s. 3(1)(i) Akta tersebut.

[3] Hakim yang bijaksana tersebut telah salah dalam meluaskan pemakaian s. 3(1)(i) untuk merangkumi kesemua tuntutan balas yang belum selesai tidak kira sama ada mereka dapat atau tidak dapat difailkan dipendengaran di mana penghakiman terus diperolehi. Pentafsiran sedemikian akan menjadi seperti mengubah kata-kata yang digunakan oleh perundangan dalam s. 3(1)(i) Akta tersebut dan tidak mempedulikan prinsip pentafsiran statut yang telah lama bertapak di mana pentafsiran harafiah akan kata-kata yang digunakan adalah jelas dan mencerminkan tujuan peruntukan tersebut.

[4] Perkataan "penghutang" yang muncul dalam kedua-dua s. 2 & 5(2) Akta tersebut mestilah bermaksud dan haruslah dihadkan kepada penghutang sebenar yang terlibat dalam tindakan kebankrapan tertentu dan tidak sepatutnya melibatkan mana-mana penghutang lain yang mungkin wujud. Untuk menyifatkan perayu sebagai pemiutang bercagar di bawah s. 5(2) Akta tersebut, mestilah ditunjukkan bahawa perayu memegang gadai-janji, cagaran atau lien ke atas harta responden sebagai jaminan untuk hutang yang patut dibayar oleh responden kepada perayu.

[5] Adalah merupakan alasan biasa bahawa responden tidak memberikan sebarang jaminan kepada perayu untuk hutangnya sebagai seorang penjamin. Oleh yang demikian sejauh mana ianya berkenaan kepada responden, perayu bukanlah pemiutang bercagar dalam lingkungan maksud s. 5(2) Akta tersebut, dan dengan itu ketidakpatuhan kepada kehendak yang sedemikian tidak harus membawa padah kepada petisyen.

[6] Pentafsiran yang lebih "luas" atau liberal akan s. 5(2) yang disokong oleh Hakim

yang bijaksana dalam kes *Yip Kim Khoon* adalah merupakan satu pemisahan yang serius daripada prinsip pentafsiran perundangan kebankrapan yang ketat yang telah lama bertapak.

[Rayuan dibenarkan dengan kos. Perintah membatalkan petisyen pemiutang penghakiman diketepikan. Petisyen dipulihkan semula dan hendaklah didengar atas merit].

Cases referred to:
Bank Negara Malaysia v. Mohd. Ismail & 2 Ors. [1992] 1 CLJ 627 / [1992] 1 MLJ 400 ***(refd)***
Rolled Steel Products Holdings Ltd. v. British Steel Corp. & Ors. [1982] 3 AER 1057 ***(refd)***
Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee[1988] 1 CLJ 155/ [1988] 1 MLJ 304 @ 305 ***(refd)***
Re a debtor (No. 75N of 1982, Warrington), ex parte The Debtor v. National Westminister Bank [1983] 3 AER 545 at 553 ***(foll)***
Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors. [1985] 1 CLJ 97/[1985] 2 MLJ 25 @ 43 ***(refd)***
Regina v. Broadcasting Complaints Division, Ex Parte Owen [1985] 1 QB 1253 @ 1174 ***(refd)***
Re Rabindera Singh s/o Arjan Singh Ex Parte: Malaysian International Bankers Bhd. [1989] 2 CLJ 858 ***(foll)***
Exparte West Riding Union Banking Company [1881] 19 Ch.D. 108 ***(refd)***
Yip Kim Khoon v. The Hongkong & Shanghai Banking Corporation [1991] 2 CLJ 1631 ***(ovrl)***
Low Mun v. Chung Khiaw Bank[1987] 2 CLJ 400 / [1988] 1 MLJ 263 at 265 ***(refd)***
D & C Bank v. Almas Motor Corporation [1989] 1 CLJ 915 / [1988] 3 MLJ 229 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 3(1)(i), 5(2)
Companies Act 1965, s. 20
Contracts Act 1950, ss. 92 & 94

Other sources referred to:
Halsbury's Law of England, Vol. 3, 4th Edn., at pp. 161 & 162

For the appellant - Matthias Chang (M.L. Leong with him); M/s. Suhaimi Khor Zulkifli & Chang
For the respondent - S.A. Lingam; M/s. S.A. Lingam & Co.

JUDGMENT

Hj. Mohd. Azmi bin Dato' Hj. Kamaruddin SCJ:

When allowing this appeal and setting aside the order of the High Court dated 11 September 1990 striking out the appellant's Bankruptcy Petition, we indicated that we would be giving our reasons. We do so now.

By a 1983 Loan Agreement, the appellant Bank gave credit facilities to San Hong Brick Sdn. Bhd. (hereinafter referred to as the Principal Borrower) by way of a term loan and overdraft facility on the securities of (1) a first legal charge created by the Principal Borrower over its 25.33 acres of land in Gurun, Kedah, (2) a debenture over fixed and floating charges over all the assets of the Principal Borrower, and (3) a joint and several personal guarantee by Mr. Samuel (the respondent), Mr. Eng Bong Hiang, Mr. Ooi Soo Nee and Madam Tan Phaik Thoo, who were all directors of the Principal Borrower. Pursuant to the Loan Agreement a contract of guarantee was executed on 26 November 1983, by Mr. Samuel together with the other three directors, in their personal capacity. The guarantee was in the usual form in which the guarantors *inter alia* "jointly and severally unconditionally and irrevocably guarantee payment on demand ... of all monies and liabilities whether certain or contingent now or hereafter owing or incurred to the Bank" by the Principal Borrower "on any account or in any manner whatever ...".

It was not in dispute that in breach of the Loan Agreement, the Principal Borrower had failed to make repayment of the banking facilities given by the appellant Bank. It was also common ground that the appellant Bank had taken action to recover the loan by winding-up proceedings against the principal borrower. On 26 February 1988 it had also obtained from the Senior Assistant Registrar a summary judgment of RM11,272,312.43 against Mr. Samuel under the contract of guarantee, comprising of RM3,861,938.32 being due on the term loan and RM2,702,885.36 under the overdraft facility together with interests thereon. The Order 14 summary judgment of RM11.2 million was upheld by the High Court, but an attempt by Mr. Samuel to appeal out of time to the Supreme Court did not materialise. In the result, the summary judgment must be accepted as a final judgment in which no stay of execution had been granted, despite the fact that a statement of defence and a counterclaim had been filed by Mr. Samuel against the Bank for the sum of RM6.25 million as special damages and an unspecified sum in general damages. The counter-claim arose from Mr. Samuel's defence in the Order 14 proceedings in which he was the 5th defendant - the other four defendants

being the Principal Borrower (1st defendant) and the remaining three co-guarantors cum directors (2nd, 3rd and 4th defendants). In essence, his defence was that the 2nd, 3rd and 4th defendants (the other three co-guarantors) had obtained the Bank credit facilities for the Principal Borrower by false representation. By paragraphs 8 and 9 of his defence, he contended that in order to induce the appellant Bank to grant the banking facilities to the Principal Borrower (1st defendant), the 2nd, 3rd and 4th defendants had manufactured false documents. By paragraph 10, Mr. Samuel also contended that the appellant Bank in granting the facilities had acted recklessly not caring whether the documents produced by the 2nd, 3rd and 4th defendants were true or false. The appellant Bank was also alleged to have assisted the 2nd, 3rd and 4th defendants in misusing the banking facilities by siphoning money from the account of the Principal Borrower for their own use to the detriment of the Principal Borrower and Mr. Samuel himself. By reason thereof, Mr. Samuel contended that the appellant Bank was liable to him and as well as to the Principal Borrower for the losses incurred. It was on this basis, that the counterclaim was launched against the appellant Bank for special and general damages.

We make no comments on any right of action that Mr. Samuel might have had against the other three directors of the Principal Borrower, who were also his co-guarantors in the loan agreement. But clearly, the appellant Bank owed no duty of care to Mr. Samuel as a director/guarantor on such banking transaction, to ensure that the other directors of the Principal Borrower had acted within their authority. On the contrary, if there had been any malpractice in the internal affairs of the Principal Borrower, it was surely the duty of Mr. Samuel as a director to take whatever action that was necessary to protect the interest of the company and its shareholders, and to notify immediately the appellant Bank of such alleged malpractice or fraud, instead of executing the Contract of Guarantee blindly and remaining completely silent until he was sued by the Bank. In the circumstances of this case, it is our view that the defence as distinct from the counterclaim did not disclose any triable issue in the Order 14 proceedings. In our opinion, on the authority of *Bank Negara Malaysia v. Mohd. Ismail & 2 Ors.* [1992] 1 MLJ 400, the assertions and denials made in the statement of defence were equivocal and lacking in precision when considered in the light of the rule in *Foss v. Harbottle* and the provision of s. 20 of the Companies Act 1965. Further there was no allegation that the Principal Borrower had no capacity under its Memorandum and Articles of Association to enter into the Loan Agreement. The fact that the 2nd, 3rd and 4th defendants might be acting beyond their powers as directors, do not necessarily mean that they were acting beyond the company's capacity. Such a distinction, should in our view be made in this case, and as such the attempt by Mr. Samuel to show that the loan transaction and *a fortiorari* the guarantee was invalid or tainted with irregularities had no basis. (see *Rolled Steel Products Holdings) Ltd. v. British Steel Corp. & Ors.* [1982] 3 AER 1057). As such we were not persuaded that the summary judgment was not a regular and final judgment.

Coming back to the appeal proper, on the issue of propriety of the striking out of the Bankruptcy Petition against Mr. Samuel, we found two of the arguments canvassed by Counsel for the appellant Bank deserved serious consideration. The first was that the learned Judge had erred in law when he held that Mr. Samuel's counterclaim exceeded or equalled the judgment sum of RM11.2 million on which the Bankruptcy Notice dated 15 January 1990, was based, within the meaning of s. 3(1)(i) of the Bankruptcy Act 1967. The second argument was that the learned Judge was wrong in holding that s. 5(2) of the Bankruptcy Act was applicable and the failure to comply with the condition imposed by that section was fatal to the creditor's Petition.

On the first argument, Section 3(1)(i) provides:

> A debtor commits an Act of bankruptcy .... if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in the Federation, or by leave of the Court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the Court; and he does not within seven days after service of the notice in case the service is effected in the Federation, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service,

either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

On the section 3(1)(i) argument, it was conceded by both parties that firstly the Bankruptcy Notice required no compliance if Mr. Samuel could satisfy the Court that he had a counter-claim against the appellant Bank which equalled or exceeded the judgment sum of RM11.2 million and that secondly the said counter-claim could not be set up during the action in which the summary judgment was obtained on 26 February 1988. Both matters were in fact expressly stated in the Bankruptcy Notice itself. At pages 4 of his judgment, the learned Judge, after quoting the provision of s. 3(1)(i) arrived at the following conclusion:

But that [i.e. section 3(1)(i)] is not of any direct relevance here because it refers to a counterclaim which the debtor could not set up in the action in which judgment was obtained against him. Here however a counterclaim has been set up in the action and is pending. The actual existence of a pending counterclaim that equals or exceeds the amount of the judgment debt must, in the context, be at least as effective as the situation envisaged by the said s. 3(1)(i) of a judgment debtor who can satisfy the Court that he has such a counterclaim but could not set it up in the action in which judgment against him was obtained. It seems to me that accordingly in the face of the existence of the said pending counterclaim it cannot be said that the debtor has committed an act of bankruptcy.

Thus, notwithstanding the inapplicability of s. 3(1)(i), the learned Judge seemed to be of the opinion that so long as the pending counterclaim equalled or exceeded the judgment sum quantified in the Bankruptcy Notice, the judgment debtor was entitled to ignore the notice even if the counterclaim was one which Mr. Samuel did not but could have set up in the action in which the summary judgment was obtained on the ground that such counterclaim could automatically prove the absence of any act of bankruptcy. Before dealing with the correctness of the opinion, it is necessary to state that three ingredients must be satisfied before the existence of a counterclaim by the debtor can be a defence to a Judgment Creditor's Petition. In *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 MLJ 304 @ 305, the Federal Court speaking through Lee Hun Hoe, CJ held that:

If the respondent was making a cross-demand he must quantify it.

The burden of proof is on the respondent to show by the affidavit that the counter-claim must be capable of being quantified in terms of money and the affidavit must quantify it. This is so stated by Warner, J. in *Re. a debtor (No. 75 N of 1982, Warrington), ex Parte The Debtor v. National Westminster Bank* [1983] 3 AER 545 at 553). The second ingredient to be satisfied in the affidavit is that the counterclaim must be put forward in good faith and must have a reasonable probabilities of success. Lastly the affidavit must show that the counterclaim could not have been set up in the action in which the judgment relied on by the creditor was obtained.

In the present appeal whilst the counterclaim on general damages was capable of being quantified in terms of money, it had not however been quantified. Thus, apart from special damages in the sum of RM6.25 million, there was nothing in any of the affidavits filed by Mr. Samuel to indicate any other quantified sum showing that the total counterclaim exceeded or equalled the judgment sum of RM11.2 million. Further, the probability of success of the counterclaim had not been mentioned or shown in the affidavit. Finally, the fact that Mr. Samuel had filed the counterclaim before the actual hearing of the Order 14 application, was not in dispute, and as such he could not now say that the counterclaim was one which he could not set up when the summary judgment was obtained within the meaning of s. 3(1)(i).

We were therefore of the opinion that it was wrong for the learned Judge to extend the application of s. 3(1)(i) to cover all pending counterclaims irrespective of whether they could or could not have been filed at the hearing in which summary judgment was obtained. Such an interpretation would be tantamount to altering the words used by the legislature in s. 3(1)(i) and ignoring the established principle

of interpretation of statutes where the literal meaning of words used is clear and reflective of the purpose of the provision [see *Foo Loke Ying & Anor. v. Television Broadcasts Ltd. & Ors.* [1985] 2 MLJ 25 @ 43 and *Regina v. Broadcasting Complaints Division, Ex Parte Owen* [1985] 1 QB 1253 @ 1174]. Having failed to satisfy all the three ingredients in his affidavits, it was clear that Mr. Samuel had not proved that he had a counterclaim which equalled or exceeded the appellant Bank's claim within the meaning of s. 3(1)(i) of the Act. The striking out of the appellant Bank's Petition on this ground was therefore wrong in law.

As regards the second argument, the question that arose was whether in this particular case the Bank as a petitioning creditor was a secured creditor *viz-a-viz*, Mr. Samuel as a guarantor, within the meaning of s. 5(2) of the Bankruptcy Act. Section 5(2) provides:

> (2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

According to Mr. Matthias Chang, Counsel for the appellant, one of the objects of this subsection was to ensure that a judgment debtor who had given security for his debt should not be made a bankrupt, if the value of the security exceeded the judgment debt or unless the debtor had other creditors and the secured creditor was willing to give up the security for the benefit of such creditors should the petition be granted. Learned Counsel also brought to our attention two conflicting decisions of the High Court on the proper interpretation of section 5(2) to determine when the requirement therein is applicable, having regards to the definition of "secured creditor" in section 2 of the Act which provides:

> Secured Creditor" means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

In *Re. Rabindera Singh s/o Arjan Singh Ex Parte: Malaysian International Bankers Bhd.* [1989] 2 CLJ 858, Siti Norma Yaccob, J. citing the case of *Exparte West Riding Union Banking Company* [1881] 19 Ch.D. 108, held at p. 859:

> From the definition, it is clear that the requirement to state the petitioner's willingness to give up the security or give the value of the security in the petition under section 5(2) only applies where the security is supplied by the debtor himself and not by some other third party.

In the petition before Her Ladyship, the debtor in the judgment creditor's petition whose liability arose as a guarantor, did not provide for the security but was given by the principal borrower (which is similar to the present appeal). For that reason, it was held that the requirement of section 5(2) did not apply.

But in a latter case, Shaik Daud, J. in *Yip Kim Khoon v. The Hongkong & Shanghai Banking Corporation* [1991] 2 CLJ 1631 would appear to hold the opposite view. In giving a wider meaning to the word "debtor" in the section 2 definition of the term "secured creditor", His Lordship held at p. 1632:

> Counsel for the creditor contends that since the property did not belong to the debtor in this petition but to a third party there is no need to mention this in the petition. He contends that in s.5(2) of the Act it talks of property of debtor and this means the principal debtor. He cited s. 94 of the Contracts Act 1950. With respect this section does not help the creditor because it gives the surety (as the judgment debtor in this petition is) entitlement to the benefit of every security which the creditor has against the principal debtor. Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Company (Kuala Lumpur) Sendirian Berhad). In any case I feel that the word debtor in s. 5(2) of the Act must be given a wider meaning then just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.

We did not know why *Rabindera Singh* case was not cited or discussed in *Yip Kim Khoon*. Mr. Lingam, Counsel for the respondent had urged us to reject *Rabindera Singh* and to adopt *Yip Kim Khoon*. We disagreed. In our view, what

was crucial here was to determine whether under s. 5(2) the appellant Bank as a petitioning creditor was a "secured creditor" not in the Loan Agreement with the principal borrower, but under theContract of Guarantee with Mr. Samuel from which had emanated Mr. Samuel's liability in the Order 14 judgment and upon which in turn the Bankruptcy Notice and Petition were based. In short, Mr. Samuel was the only "debtor" in the bankruptcy proceeding before the Court on account of the judgment, and his alleged act of bankruptcy was governed by section 3(1)(i) for non-compliance with a bankruptcy notice. In the circumstances, we are of the opinion that the word "debtor" appearing in both ss. 2 and 5(2) must mean and should be limited to the actual "debtor" involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant Bank as a "secured creditor" under s. 5(2), it must be shown that the appellant Bank was holding a mortgage, charge or lien on the property of Mr. Samuel, as a security for the debt of RM11.2 million due to the Bank from Mr. Samuel. It was common ground that Mr. Samuel had not given any security to the bank for his debt as a guarantor. Both the landed security and debenture, were admittedly given by the Principal Borrower and none by Mr. Samuel. In fact the contract of guarantee executed by Mr. Samuel was a third form of collateral or security given to the Bank in addition to the landed charge and debenture. Thus, in this particular bankruptcy proceeding as far as Mr. Samuel was concerned, the appellant Bank was not a secured creditor within the meaning of s. 5(2), and as such non-compliance with its requirement could not be fatal to the Petition. Further, the "wider" or liberal interpretation of s. 5(2) advocated by Shaik Daud, J. was a serious departure from the established principle of strict interpretation of bankruptcy legislation [see **Halsbury's Law of England,** Vol. .3 (4th Edn.) at pp. 161, 162 and *Low Mun v. Chung Khiaw Bank* [1988] 1 MLJ 263 at 265]. We accordingly approved the judgment of Siti Normah, J. in *Rabindera Singh* in preference to *Yip Kim Khoon.*

Mr. Lingam had referred to us the case of *D & C Bank v. Almas Motor Corporation* [1988] 3 MLJ 229 where the provisions of ss. 92 and 94 of the Contracts Act 1950 were considered in an Order 14 application against a guarantor. For the purpose of interpretation of s. 5(2) of the Bankruptcy Act, we found no real purpose or relevancy in getting assistance from these provisions of the Contract Act. Sections 92 and 94 of the 1950 Act may be relevant to determine the liability of a guarantor at the hearing in which judgment was sought against the guarantor as a debtor, but not for the purpose of determining the term "secured creditor" under s. 5(2) which has been clearly defined by s. 2 of the Bankruptcy Act.

For the reasons given, we were of the view that the learned Judge had erred in law on the interpretation of both section 3(1)(i) and s. 5(2) of the Bankruptcy Act. The two grounds of appeal must succeed, and we therefore allowed the appeal with costs both here and below, and set aside the order striking out the judgment creditor's petition. The petition was therefore restored and should accordingly be heard on its merits.